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Supreme Court, U.S.
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No. 04-1375

IN THE

Supreme Court of the United States

SAMUEL GLAZER,

Petitioner,

v.

LEHMAN BROTHERS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS SG COWEN SECURITIES CORPORATION & SOCIETE GENERALE

P. BENJAMIN DUKE
Counsel of Record
PHILIP A. IRWIN
COVINGTON & BURLING
1330 Avenue of the Americas
New York, New York 10019
(212) 841-1000

Counsel for Respondents SG Cowen Securities Corporation and Société Générale

194960

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly conclude that Petitioner's challenge to the validity of his brokerage account agreements, on the ground that his broker intended to defraud Petitioner when he signed the agreements, is subject to mandatory arbitration under the doctrine of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)?

2. Did the Court of Appeals correctly conclude that arbitration clauses in integrated written brokerage account agreements are not literally "separate contracts" under *Prima Paint*, and that Ohio's parol evidence rule therefore bars a claim of fraudulent inducement based on an alleged oral promise that directly contradicted the terms of the arbitration provision contained in the agreements?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent SG Cowen Securities Corporation, now known as SG Cowen & Co. LLC, is a single member LLC in which SG Americas Securities Holdings, Inc. is the only member. SG Americas Securities Holdings, Inc. is wholly owned by SG Americas, Inc. SG Americas, Inc. is wholly owned by Respondent Société Générale, which is a publicly owned company. Société Générale has no parent company and no publicly owned company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	4
I. The Sixth Circuit's Decision In *Fazio* Involved A Straightforward Application Of The *Prima Paint* Doctrine And Does Not Implicate A Circuit Split	4
A. The *Fazio* Court Correctly Treated Petitioner's Challenge As A Garden-Variety Claim of Fraudulent Inducement Of The Agreement As A Whole	5
B. *Fazio* Does Not Conflict With Any Other Circuit Court Decisions, Much Less Implicate A "Circuit Split."	8
II. The *Glazer* Court Correctly Applied The Doctrine of *Prima Paint* By Fully Enforcing The Parol Evidence Rule Under Ohio Law	12
CONCLUSION	15

TABLE OF CITED AUTHORITIES

CASES *Page*

3H & Associates, Inc. v. Hanjin Engineering & Construction Co., No. 97-16751, 1998 WL 657722 (9th Cir. Sep. 3, 1998) 10

Arnold v. Arnold Corp.-Printed Communications For Bus., 920 F.2d 1269 (6th Cir. 1990) 5, 6

Barker v. Golf U.S.A., Inc., 154 F.3d 788 (8th Cir. 1998) 14

Burden v. Check Into Cash of Kentucky, LLC, 267 F.3d 483 (6th Cir. 2001) 6, 11

C.B.S. Employees Federal Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp., 912 F.2d 1563 (6th Cir. 1990) 6

Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860 (Fla. 2005) 12

Chastain v. Robinson-Humphrey Co., 957 F.2d 851 (11th Cir. 1992) 9

China Minmetals Materials Importation & Exp. Co. v. Chi Mei Corp., 334 F.3d 274 (3d Cir. 2003) .. 9

Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996) 13

Cited Authorities

Page

Doctor's Associates, Inc. v. Distajo, 66 F.3d 438 (2d Cir. 1995) 14

Fazio v. Lehman Brothers, Inc., 268 F. Supp. 2d 865 (N.D. Ohio 2002) .....*passim*

Fazio v. Lehman Brothers, Inc., 340 F.3d 386 (6th Cir. 2003) 2, 4

Galmish v. Cicchini, 734 N.E.2d 782 (Ohio 2000) 7, 13

Glazer v. Lehman Brothers, Inc., 394 F.3d 444 (6th Cir. 2005) 3, 12, 14

Harris v. Green Tree Financial Corp., 183 F.3d 173 (3d Cir. 1999) 14

Harter v. Iowa Grain Co., 220 F.3d 544 (7th Cir. 2000) 10

Interocean Shipping Co. v. National Shipping & Trading Corp., 462 F.2d 673 (2d Cir. 1972) 9

Jenkins v. First America Cash Advance, 400 F.3d 868 (11th Cir. 2005) 11

Large v. Conseco Finance Servicing Corp., 292 F.3d 49 (1st Cir. 2002) 10

Cited Authorities

	Page
Nilavar v. Osborn, 711 N.E.2d 726 (Ohio Ct. App. 1998)	7
Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51 (3d Cir. 1980)	9
Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967)	*passim*
Sandvik AB v. Advent International Corp., 220 F.3d 99 (3d Cir. 2000)	8, 9
Snowden v. Checkpoint Check Cashing, 290 F.3d 631 (4th Cir. 2002)	10, 11
Spahr v. Secco, 330 F.3d 1266 (10th Cir. 2003)	9
Sphere Drake Insurance Ltd. v. All America Insurance Co., 256 F.3d 587 (7th Cir. 2001)	9
Sphere Drake Insurance Ltd. v. Clarendon National Insurance Co., 263 F.3d 26 (2d Cir. 2001)	9
Sweet Dreams Unlimited Inc. v. Dial-A-Mattress International Ltd., 1 F.3d 639 (7th Cir. 1993)	10
Three Valleys Municipal Water District v. E.F. Hutton & Co., 925 F.2d 1136 (9th Cir. 1991)	9
Wilson Electrical Contractors, Inc. v. Minnotte Contracting Corp., 878 F.2d 167 (6th Cir. 1989)	14

BEST AVAILA

Cited Authorities

Page

STATUTE

9 U.S.C. § 4 9

OTHER AUTHORITY

1 Williston on Contracts § 4:1 (4th ed. 1990) 7

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STATEMENT OF THE CASE

Petitioner Samuel Glazer opened a brokerage account in 1998 with Frank Gruttadauria, a broker in the Cleveland office of Respondent SG Cowen Securities Corporation ("SG Cowen"). At the time he opened his account, Glazer signed four standard-form SG Cowen account agreements containing mandatory arbitration clauses. Pet. App. 53. The executed agreements were sent to SG Cowen without modification by Glazer's attorney and financial advisor, Terry McHugh. Pet. App. 54. During his employment with SG Cowen and later Lehman Brothers, Inc. ("Lehman"), Gruttadauria engaged in criminal misconduct with respect to some of his customer accounts, including Glazer's account. Gruttadauria's misconduct involved misappropriations of funds from customer accounts, the provision of false account statements to customers, and the diversion of genuine customer statements to addresses that Gruttadauria controlled.

Petitioner sued SG Cowen and Lehman in the United States District Court for the Northern District of Ohio, asserting various claims sounding in fraud and conversion. Respondents moved for a stay pending arbitration pursuant to the broad arbitration clauses contained in the account agreements Glazer had signed.

The district court denied Respondents' arbitration motions in a consolidated ruling that simultaneously denied Respondents' similar motions in several other lawsuits brought by former customers of Gruttadauria. *See Fazio v. Lehman Bros., Inc.*, 268 F. Supp. 2d 865 (N.D. Ohio 2002). The district court held that the brokerage account agreements signed by the plaintiffs were void *ab initio* because Gruttadauria's fraudulent intent at the time the account

agreements were executed prevented a "meeting of the minds" between Respondents and the customers. Pet. App. 78. Although Gruttaduaria's alleged fraud did not relate to the arbitration provisions, the district court distinguished *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), on the ground that *Prima Paint*'s separability doctrine did not apply to contracts that were purportedly void *ab initio*. Pet. App. 77-78. The district court also held that the scope of the arbitration clauses did not include the plaintiffs' claims for theft. Pet. App. 79-85.

In a consolidated appeal from the above ruling, the United States Court of Appeals for the Sixth Circuit reversed the district court's opinion. *See Fazio v. Lehman Bros., Inc.*, 340 F.3d 386 (6th Cir. 2003). Applying the *Prima Paint* doctrine, the court of appeals held that the plaintiffs' claims were arbitrable because their allegations concerning Gruttadauria's fraudulent scheme did not constitute a "well-founded claim of fraud in the inducement of the arbitration clause itself, *standing apart from the whole agreement.*" Pet. App. 40 (emphasis in original and internal quotation marks omitted). The court also concluded that the plaintiffs' claims fell within the broad scope of the arbitration clauses. Pet. App. 42-45. The Sixth Circuit remanded the cases to give each of the plaintiffs an opportunity to raise any individualized challenges to the validity of the arbitration clauses. Pet. App. 47-48.

On remand, Glazer requested a hearing on the arbitrability of his claims, alleging that the arbitration provisions in his account agreements had been fraudulently induced by an alleged oral assurance by Gruttadauria that SG Cowen would not enforce arbitration. After conducting an evidentiary hearing, the district court found in favor of

Glazer, rejecting Respondents' argument that the Ohio parol evidence rule barred any consideration of an oral assurance that directly contradicted the express language of the arbitration provisions. The court reasoned that the arbitration clauses embedded in the account agreements were "separate and distinct" contracts under *Prima Paint*. Pet. App. 61. Parol evidence therefore could be used to prove that the arbitration clauses were "sham" agreements and unenforceable under Ohio law. Pet. App. 62. The district court's "separate and distinct" contract analysis enabled it to circumvent the Ohio barring the use of the "sham" agreement doctrine to invalidate a single term within an otherwise enforceable contract.

On appeal, the Sixth Circuit again rejected the district court's analysis and ordered the district court to send the case to arbitration. *Glazer v. Lehman Bros., Inc.*, 394 F.3d 444 (6th Cir. 2005). Citing a chorus of other federal appellate decisions, the court of appeals held that arbitration clauses are *not* literally separate and distinct contracts that must by themselves have all the essential elements of a contract. Pet. App. 14. The severability doctrine of *Prima Paint* requires only that arbitration clauses must be enforced even if the contract as a whole was fraudulently induced. Consequently, the "sham" agreement exception was inapplicable, and the parol evidence rule barred Glazer's attempt to invalidate the written arbitration provision alone based on an alleged oral promise. Pet. App. 24-27.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit's Decision In *Fazio* Involved A Straightforward Application Of The *Prima Paint* Doctrine And Does Not Implicate A Circuit Split.

Petitioner's attempt to identify an issue warranting this Court's review rests upon two basic misconceptions. *First*, while Petitioner characterizes his contention in *Fazio* as a claim that his brokerage agreements were "void *ab initio*," his actual argument to the *Fazio* court presented nothing more than a garden-variety claim of fraudulent inducement of the contract as a whole. The Sixth Circuit correctly reversed the district court's faulty "void *ab initio*" reasoning and remanded the case based upon a straightforward application of the *Prima Paint* doctrine.

Second, the purported split identified by Petitioner in the circuits' treatment of so-called "void *ab initio*" claims is illusory. Notwithstanding some courts' reference to the "void-voidable distinction" as the basis for their arbitrability decisions, the circuits have consistently held that all challenges to the contract as a whole other than narrow claims that a party did not assent to the contract, such as forgery and lack of signatory power, must be submitted to arbitration. The only genuine conflict in the lower courts' disposition of these issues is a conflict between the federal circuits and certain state courts, which have refused to require arbitration of claims that a contract containing an arbitration provision was illegal or unconscionable under applicable state law. Even assuming that this conflict warranted this Court's review, however, the *Fazio* decision would not be a proper vehicle for addressing it, because Glazer has never suggested that his brokerage agreements with Respondents were illegal or against public policy.

A. The *Fazio* Court Correctly Treated Petitioner's Challenge As A Garden-Variety Claim of Fraudulent Inducement Of The Agreement As A Whole.

In *Fazio*, Petitioner contended, and the district court held, that Petitioner's brokerage account agreements with Respondents were "void *ab initio*," on the ground that "Gruttadauria's criminal purpose barred the formation of a contract based on ordinary principles of state contract law." Pet. App. 9; *cf.* Pet. App. 40 ("The district court held that, because the money in the accounts was largely stolen and Gruttadauria had no intention of acting as a true broker for the plaintiffs, no account agreements really existed, thus making the agreements void *ab initio* and invalidating the arbitration clauses."). The Sixth Circuit correctly rejected this reasoning, holding that the mere creation of a fraudulent account did not void the arbitration clauses and did not present a claim of "'fraud in the inducement of the arbitration clause itself, *standing apart from the whole agreement*,'" as required to avoid arbitration under the *Prima Paint* doctrine. Pet. App. 40 (quoting *Arnold v. Arnold Corp.-Printed Communications For Bus.*, 920 F.2d 1269, 1278 (6th Cir. 1990)) (emphasis in original).

As the Sixth Circuit perceived, Petitioner's contention that the underlying account agreements "never came into existence" rests upon a garden-variety claim of fraudulent inducement – namely, that he was fraudulently induced to enter into a brokerage relationship, based upon Gruttadauria's false representations that he would honestly manage Petitioner's account. An analogous claim of undisclosed fraudulent intent was presented in *Prima Paint* itself, where it was alleged that the defendant "fraudulently represented

that it was solvent and able to perform its contractual obligations, where as it was in fact insolvent and intended to file a petition under Chapter XI of the Bankruptcy Act . . . shortly after execution of the consulting agreement." 388 U.S. at 398. Relying upon both *Prima Paint* and the Sixth Circuit's prior decisions in *Arnold*, *supra*, and *C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 912 F.2d 1563 (6th Cir. 1990), the *Fazio* court rejected Petitioner's argument on the well-established grounds that, "under *Prima Paint*, allegations of fraudulent schemes are 'no longer sufficient to overcome the strong federal policy in favor of arbitration.'" Pet. App. at 40-41 (quoting *Arnold*, 920 F.2d at 1281).

Although it cited *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483 (6th Cir. 2001), the *Fazio* court did not entangle itself in discussion of the so-called "void / voidable" distinction on which Petitioner focuses here. Nor was that purported distinction necessary or even relevant to the Sixth Circuit's disposition of Petitioner's claim. To the contrary, unlike the plaintiffs in *Burden*, Petitioner did not assert any claim that the underlying brokerage contracts were substantively illegal or in violation of any public policy. *See* 267 F.3d at 486-90 (contracts allegedly usurious and made by defendants without proper state licenses). Petitioner's essential contention was *not* that the contracts were void for illegality, but rather that no contract had ever been formed under applicable principles of Ohio contract law. As the Sixth Circuit recognized, this argument went to the making of the contract as a whole and therefore fell squarely within the purview of *Prima Paint*. Pet. App. 40-42.

Moreover, the *Fazio* decision is firmly supported by Ohio law on the formation of contracts, which refutes Petitioner's contention that Gruttadauria's criminal intent rendered the

customer agreements "void *ab initio*." Petitioner contends here that "the Sixth Circuit and other appellate courts" should not be allowed to "ignore states' rights to determine the types of contracts that may come into existence." Pet. 18. Yet black-letter Ohio law holds that "[s]ecretly held, unexpressed intent is *not* relevant to whether a contract is formed," and "[c]ourts may still find a 'meeting of the minds' even if one party keeps a secret present intention to disregard his obligations under a newly formed contract." *Nilavar v. Osborn*, 711 N.E.2d 726, 733 (Ohio Ct. App. 1998) (emphasis added); *see also* 1 Williston on Contracts § 4:1 (4th ed. 1990) ("In the formation of contracts, . . . it was long ago settled that secret intent is immaterial, so that mutual assent is to be judged only by overt acts and words rather than by the hidden or secret intention of the parties."). Consistent with this rule, allegations of undisclosed dishonest intent raise only a claim of fraudulent inducement, not one of voidness. *See Galmish v. Cicchini*, 734 N.E.2d 782, 791 (Ohio 2000) (holding that "promise with intent not to perform" was "[t]he essence of [Plaintiff's] fraudulent inducement claim"). Thus, it is Petitioner who improperly seeks to contravene "states' rights" by characterizing his claim of fraudulent inducement in a manner wholly inconsistent with applicable state law.

In sum, the Sixth Circuit in *Fazio* engaged in a straightforward application of the *Prima Paint* doctrine based upon a proper refusal to adopt Petitioner's self-serving mischaracterization of his own argument. No further consideration is warranted where the court of appeals declines to exalt labels over substance and faithfully applies the decades-old jurisprudence of this Court. Because that is the situation presented here, the Petition should be denied.

B. *Fazio* Does Not Conflict With Any Other Circuit Court Decisions, Much Less Implicate A "Circuit Split."

While Petitioner failed to assert a genuine "void *ab initio*" claim in *Fazio*, there is also no basis for his contention that the federal circuits are split in their approach to such claims. Notwithstanding some confusing dicta in the case law, the courts of appeals have been broadly consistent in compelling arbitration of all attacks upon the substantive validity of a contract, while permitting courts to adjudicate only those challenges directed at the capacity or authority of the signatory. Petitioner fails to identify any true conflict between the holdings of the various circuits, and this case simply does not implicate the unresolved conflict between the federal circuits and certain state courts concerning the proper forum for deciding threshold claims that a contract is illegal or against public policy. This case therefore presents no issue worthy of this Court's attention.

Petitioner contends that the Sixth Circuit's decision in *Fazio* conflicts with decisions by "five federal circuits and many state high courts" purportedly limiting the *Prima Paint* doctrine to contracts that are merely "voidable" but not "void." Pet. 18-19. Thus, he asserts that the First, Second, Third, Seventh and Ninth Circuits have endorsed a "clear, bright-line rule" under which claims that a contract is "voidable" must be arbitrated, while "*all* claims that a contract is void are reserved for the court." Pet. 19 (citing *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 107-09 (3d Cir. 2000), as "[t]he leading case"). A review of the cases on which Petitioner relies, however, demonstrates that Petitioner's interpretation of the foregoing Circuits' decisions is unfounded.

All of the cases cited by Petitioner that refused to compel arbitration – including the Third Circuit's decision in *Sandvik* – concerned issues of signatory capacity or power, such as forgery, mental incompetence, or an alleged agent's disputed authority to bind a principal. *See China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 281 (3d Cir. 2003) (forgery); *Sandvik*, 220 F.3d at 104-07 (lack of signatory authority by agent); *Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co.*, 263 F.3d 26, 32 (2d Cir. 2001) (same); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001) (same); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1139-42 (9th Cir. 1991) (same); *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980) (lack of signatory authority)[1]; *Interocean Shipping Co. v. Nat'l Shipping & Trading Corp.*, 462 F.2d 673, 676-78 (2d Cir. 1972) (lack of signatory authority and allegation that appellant not a party to contract containing arbitration provision); *see also Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992) (alleged absence of signatures on contracts); *Spahr v. Secco*, 330 F.3d 1266, 1272 (10th Cir. 2003) (mental incapacity). The decisions in the above cases not only concerned the alleged absence of one party's assent to the contract – thus implicating the "making of the agreement for arbitration," 9 U.S.C. § 4 – but also turned upon discrete issues susceptible to threshold adjudication by the court, without requiring it to address the substantive merits of the

1. Petitioner incorrectly cites *Par-Knit Mills* for the proposition that the court must resolve "a claim that there was no meeting of the minds on the terms of the underlying contract." Pet. App. 20. In fact, the *Par-Knit* court merely attributed that argument to the appellant, while actually holding that the court must decide only whether the employee who signed the contract at issue had the requisite authority to bind the defendant company. *See* 636 F.2d at 54.

underlying dispute. Here, Petitioner's claim did not touch upon any of these issues, but rather concerned the substantive nature and extent of the contractual relationship established between the parties as a result of particular factual circumstances.[2] Consequently, the claim was subject to arbitration under *Prima Paint.*

Moreover, even those Circuits that apparently endorsed the "void / voidable" distinction in the contexts above have uniformly compelled arbitration when presented with substantive attacks upon the validity of a contract on grounds of illegality or public policy. Thus, the Seventh Circuit has held that a claim that a contract was illegal under state law did not infect the making of the arbitration clause itself and was therefore arbitrable. *See Harter v. Iowa Grain Co.*, 220 F.3d 544, 550 (7th Cir. 2000); *accord Sweet Dreams Unlimited Inc. v. Dial-A-Mattress Int'l Ltd.*, 1 F.3d 639, 641-42 (7th Cir. 1993). The Ninth Circuit, in an unpublished decision not mentioned by Petitioner, has reached the same conclusion. *See 3H & Assocs., Inc. v. Hanjin Eng'g & Constr. Co.*, No. 97-16751, 1998 WL 657722 (9th Cir. Sep. 3, 1998); *see also Large v. Conseco Fin. Serv. Corp.*, 292 F.3d 49, 52-56 (1st Cir. 2002) (compelling arbitration of claim that contract was void because defendant violated a federal truth-in-lending statute). These Circuits have compelled arbitration of claims of illegality even though contracts found to be illegal or invalid on grounds of public policy are typically considered not merely "voidable," but altogether "void." *See, e.g., Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 636 (4th Cir. 2002).

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2. Petitioner mistakenly contends that "Respondents do not dispute the[] facts" recited at Pet. App. 7. Though Respondents did not dispute that Gruttadauria generally had committed fraud and had sent false documents to Petitioner, many of the detailed factual allegations on which Petitioner relies were not conceded by Respondents.

Hence, the operative principle in the federal court decisions is broadly consistent, and it does not turn on the "void / voidable" distinction, but rather on whether the challenge to the existence of the agreement both affects the arbitration provision itself and can be adjudicated without immersing the court in the substantive merits of the underlying dispute. In *Burden*, *supra*, the Sixth Circuit applied this principle in a case involving consumer fraud in an allegedly usurious check cashing/loan scheme, compelling arbitration of the claims even though – as the *Fazio* court noted – the underlying contract "may well be void and rife with fraud." Pet. App. 41 (citing *Burden*, 267 F.3d at 489-90); *accord Snowden*, 290 F.3d at 637; *Jenkins v. First Am. Cash Advance*, 400 F.3d 868, 880-82 (11th Cir. 2005). Petitioner here fails to cite any federal court decision that directly conflicts with the Sixth Circuit's holding in *Burden*, let alone its decision in *Fazio*.

To the contrary, the only conflicting cases cited by Petitioner are decisions by *state* courts refusing to compel arbitration under the FAA of claims that a contract containing an arbitration provision was void for illegality under state law. *See* Pet. App. 21-22. But Petitioner does not even contend – nor could he – that the standard securities brokerage agreements at issue in *Fazio* were illegal or against public policy. Consequently, although Petitioner identifies an arguable conflict between certain state-court decisions and the Sixth Circuit's ruling in *Burden* (which this Court declined to review), he completely fails to point to any such conflict with *Fazio*. *Fazio* simply does not implicate any material conflict or uncertainty in the law and therefore does not merit this Court's review.[3]

3. To the extent that some state court decisions conflict with these federal cases in holding that claims of contract illegality are not arbitrable, that conflict should be resolved in a case involving an (Cont'd)

II. The *Glazer* Court Correctly Applied The Doctrine of *Prima Paint* By Fully Enforcing The Parol Evidence Rule Under Ohio Law.

Though he "implores" this Court to "intervene" on his behalf by reversing the Sixth Circuit's decision in *Glazer*, Petitioner fails to identify any plausible legal rationale for such a step by this Court. Petitioner begs this Court to radically expand the *Prima Paint* doctrine, by establishing preemptive rules of federal common law that would bar the application of state parol evidence principles to claims of fraudulent inducement of an arbitration clause. There is no warrant for this Court to launch such an incursion against the traditional operation of state-law contract rules.

To begin with, there is no merit to Petitioner's contention that *Glazer* somehow renders the *Prima Paint* doctrine a "nullity." Petitioner insists that *Prima Paint* can be invoked successfully only if it entails special rules of "federal substantive law" to which state common-law parol evidence rules must "give way." Pet. App. 26. But it is just not true that a claim of fraudulent inducement of an arbitration clause cannot satisfy the standard of *Prima Paint* without relying upon representations that contradict the clause itself. To the contrary, it is not difficult to posit a variety of *extrinsic*

(Cont'd)

allegedly illegal contract, such as *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860 (Fla. 2005), in which a petition for a writ of *certiorari* is currently pending before the Court, Docket No. 04-1264. Even if the Court granted the petition in *Cardegna*, however, the Glazer decision is factually distinct and would be unaffected by the outcome of the Court's review of *Cardegna*. Hence, irrespective of the Court's disposition in *Cardegna*, the Petition here should be immediately denied.

representations concerning arbitration on which such a claim could be founded. For example, a brokerage firm could make false statements concerning the past success rate of claimants in arbitration. Or a firm could falsely state that it has always allowed arbitration claimants to obtain unlimited discovery, or that it has never invoked an arbitration provision in the past. These examples all concern matters extrinsic to the agreement and thus could potentially form the basis of a valid claim of fraudulent inducement of an arbitration clause. The *Glazer* court recognized and left open such possibilities, noting that the Ohio parol evidence rule permits consideration of alleged false promises that are "'either independent of or consistent with the written instrument.'" Pet. App. 22 (quoting *Galmish*, 734 N.E.2d 782 at 790-91).[4]

Furthermore, Petitioner's argument here flies in the face of this Court's opinion in *Prima Paint* itself, which expressly disavowed any intention to exempt arbitration provisions from the enforcement of such state-law rules. *See* 388 U.S. at 404 n.12. Under the FAA, arbitration clauses must be placed "upon the same footing" as any other contractual provisions and enforced or invalidated under generally applicable doctrines of state contract law. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (internal quotation marks omitted). Petitioner's plea to exclude arbitration clauses from the operation of the parol evidence rule violates this basic principle.

Nor is there any foundation for Petitioner's unsupported assertion that the court of appeals misconstrued the

4. It bears emphasis that the parol evidence rule is *not* a rule of evidence or procedure, but rather a substantive rule of contract law integral to the very nature and definition of a contract under the applicable state law. Pet. App. 19 (quoting *Galmish*).

"separability" doctrine of *Prima Paint* by holding that arbitration provisions contained within fully integrated agreements are not literally "separate, independent contracts" for all purposes. Pet. App. 16-17. Petitioner does not even attempt to grapple with the court of appeals' reasoning, nor does he point to any error in the numerous other federal appellate decisions that reach the same conclusion. *See Wilson Elec. Contractors, Inc. v. Minnotte Contracting Corp.*, 878 F.2d 167, 169 (6th Cir. 1989) (holding that an arbitration provision is not "an independent contract" and need not have "all essential elements of a contract, including consideration"); *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 180 (3d Cir. 1999); *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 452 (2d Cir. 1995); *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 792 (8th Cir. 1998). Any other reading of *Prima Paint* would create a host of new ways for parties to avoid arbitration, contrary to the strong federal policy repeatedly enunciated by this Court. Petitioner does not even acknowledge the above authorities, much less cite any affirmative legal support for his position.

Finally, the *Glazer* court's purported "*Prima Paint* disappearing act," Pet. 28, is an empty metaphor, one that ignores the sound logic of the court's decision. Under *Prima Paint*, the arbitration clause must be analyzed independently in deciding whether the court (as opposed to the arbitrator) can examine a claim of fraudulent inducement, *see* Pet. App. 17. Once the proper forum for the claim has been determined, however, the court must place the contract as a whole on "the same footing" as any other contract under applicable state law. Hence, the *Glazer* court correctly refused to apply the so-called "sham agreement" doctrine to the arbitration clause in isolation, since under Ohio law that doctrine cannot be invoked against a single term of an otherwise enforceable

contract. Pet. App. at 24-25 (distinguishing Ohio "sham agreement" cases). If accepted, Petitioner's argument would vitiate state parol-evidence rules and make arbitration clauses uniquely susceptible to attack on grounds to which any other individual contractual provision would be immune. Neither this Court nor any lower court has endorsed this logic, and nothing either in *Prima Paint* or in this Court's other precedents would commend it.

In light of the above, Petitioner's request for review of the Glazer decision has no merit and should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

P. BENJAMIN DUKE
Counsel of Record
PHILIP A. IRWIN
COVINGTON & BURLING
1330 Avenue of the Americas
New York, NY 10019
(212) 841-1000

Counsel for Respondents
SG Cowen Securities Corporation
and Société Générale

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

KENNETH D. SCHWARTZ, *Counsel of Record*
ROBERT P. DUVIN
EMILY C. FIFTAL

DUVIN, CAHN & HUTTON
Erieview Tower, 20th Floor
1301 East Ninth Street
Cleveland, Ohio 44114
Telephone: (216) 696-7600
Facsimile: (216) 696-2038
kschwartz@duvin.com
rduvin@duvin.com
efiftal@duvin.com

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii
I.	The Current Petition Should Be Granted And Decided In Tandem With The Recently Granted Petition In *Buckeye Check Cashing v. Cardegna*	1
II.	Respondents Effectively Admit That The *Prima Paint* Fraudulent Inducement Defense Does Not Exist	6
III.	Respondents Failed To Reconcile The Inherent Conflict Between The Two Panel Decisions In The Current Case	7
CONCLUSION		8

TABLE OF AUTHORITIES

Page

CASES

Boomer v. AT&T Corporation, 309 F.3d 404 (7th Cir. 2002) 4

Buckeye Check Cashing, Inc. v. Cardegna, United States Supreme Court, Docket No. 04-1264 (certiorari granted June 20, 2005) 1, 2, 3, 6

Burden v. Check Into Cash, 267 F.3d 483 (2001) ... 2, 3, 6, 7, 8

Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860 (Fla. S. Ct. 2005) 1

Denney v. BDO Seidman, L.L.P., ___ F.3d ___, No. 04-2654, 2005 WL 1389911 (2nd Cir. June 14, 2005) 3

Great Earth Cos., Inc. v. Simons, 288 F.3d 878 (6th Cir. 2002) 6

Interocean Shipping Co. v. Nat'l Shipping & Trading Co., 462 F.2d 673 (2nd Cir. 1972) 4

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Kean-Argovitz Resorts, 383 F.3d 512 (6th Cir. 2004) 3

PMC, Inc. v. Atomergic Chems. Corp., 844 F. Supp. 177 (S.D.N.Y. 1994) 4

Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967) 2, 4, 6, 7, 8

Primerica Life Ins. Co. v. Brown, 304 F.3d 469 (5th Cir. 2002) 3

Spahr v. Secco, 330 F.3d 1266 (10th Cir. 2003) 3

Specht v. Netscape Communications Corp., 306 F.3d 17 (2nd Cir. 2002) 4

TABLE OF AUTHORITIES – Continued

Page

Sphere Drake Ins. Ltd. v. All Am. Ins. Co., 256 F.3d 587 (7th Cir. 2001) 2

Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440 (3rd Cir. 2003) 4

U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., 241 F.3d 135 (2d Cir 2001) 4

Wilson Electrical Contractors, Inc. v. Minnotte Contracting Corp., 878 F.2d 167 (6th Cir. 1989) 7

I. The Current Petition Should Be Granted And Decided In Tandem With The Recently Granted Petition In *Buckeye Check Cashing v. Cardegna.*[1]

A writ of certiorari should clearly be granted on Glazer's first question presented due to the fact that on June 20, 2005, this Court granted the petition for a writ of certiorari in *Buckeye Check Cashing, Inc. v. Cardegna*, Docket No. 04-1264, on a question that is squarely on point with the current Petition. Glazer cited the *Buckeye Check Cashing* case as one of the important court decisions conflicting with the Sixth Circuit's decision in the current case and with several other federal courts of appeal. *See* Petition at 22. In *Buckeye Check Cashing*, the Florida Supreme Court held that a court, not an arbitrator, must resolve a claim that a contract containing an arbitration provision is void *ab initio* under Florida law because a State statute rendered the contract illegal. The Florida Supreme Court ruled that if the contract never came into existence under Florida law, then the arbitration clause in it could not be enforced. *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860 (Fla. S. Ct. 2005). Buckeye Check Cashing contends that an arbitrator must

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[1] The current Petition is solely on behalf of Samuel Glazer and seeks a writ of certiorari only as to the case of *Samuel Glazer v. SG Cowen Securities Corporation, Societe Generale, Lehman Brothers, Inc. and Lehman Brothers Holdings, Inc.*, which is reported in the consolidated opinion reported as *Fazio et al. v. Lehman Bros., Inc., et al.*, 340 F.3d 386 (6th Cir. 2003), and 394 F.3d 386 (6th Cir. 2003). JP Morgan Chase and Cowen & Company are not parties in Petitioner's lawsuit, they have not indicated any continuing interest that is ripe before this Court, and their Briefs in Opposition are therefore not relevant in this matter.

resolve this void *ab initio* question, and posited the following question on which certiorari was granted:

> Whether the Florida Supreme Court erred by holding, consistent with the Alabama Supreme Court but in direct conflict with six federal courts of appeals, that the Federal Arbitration Act allows a party to avoid arbitration by claiming that the underlying contract containing an arbitration clause (but not the arbitration clause itself) is void for illegality.

Petitioner Glazer's claim in the current case posits the same fundamental question for the Court: Must a court or an arbitrator resolve a claim that no contract came into existence? If no contract came into existence, "[n]o contract, no power." *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001). Granting Glazer's Petition, and deciding this case in tandem with *Buckeye Check Cashing*, will best resolve the question of a court's authority and will negate any attempts to limit the Court's holding on the "no contract, no power" issue only to statute-based void *ab initio* claims.

Respondents' contention that the Petition should be denied is based in large part on their flawed view, like the Sixth Circuit's flawed opinion, that *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), mandates arbitration of all claims targeting the contract as a whole (except for the most narrow forgery and signatory power claims). In the current case, the Sixth Circuit rotely applied its decision in *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483 (2001), which compelled arbitration of a claim that an underlying contract was void under an Ohio lender licensing statute. The *Burden* decision, and its progeny including the current case,

conflict with *Buckeye Check Cashing*, therefore demonstrating that a writ of certiorari should be issued in the current case.

Respondents further contend that Glazer's Petition should not be granted because the facts in the current case are different from cases such as *Burden*, *Buckeye Check Cashing* and other cases involving void *ab initio* claims based on statutory mandates. However, it is vitally important that this Court clearly illustrate that all state law claims that no contract came into existence must be resolved by a court, and not an arbitrator. The Sixth Circuit in the current case refused to consider any of the facts or law associated with Mr. Glazer's claim that no contract ever existed, because the Sixth Circuit is mired in its dogmatic belief that any claim targeting the contract as a whole must be referred to arbitration even though the result is patently illogical. *See Burden*, 267 F.3d at 488-90; *see also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Kean-Argovitz Resorts*, 383 F.3d 512, 518-21 (6th Cir. 2004) (Cleland, J., concurring) (District Judge Cleland concurred in result because of Circuit precedent but explained the legal and logical flaws in *Burden* and other similar Sixth Circuit cases). Granting Glazer's Petition and considering his claims will provide vital elucidation on this important fundamental legal question of the court's authority, which implicates factual contexts other than statute-based void *ab initio* claims. *Compare Spahr v. Secco*, 330 F.3d 1266, 1273 (10th Cir. 2003) (a court resolves a claim of lack of mental capacity to enter into contract) with *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 472 (5th Cir. 2002) (arbitrator, not court, must resolve claim of lack of mental capacity); *see also Denney v. BDO Seidman, L.L.P.*, ___ F.3d ___ No. 04-2654, 2005 WL

1389911, at *7 (2nd Cir. June 14, 2005) (suggesting that arbitration is appropriate despite finding of a "mutual fraud" in which *both* parties never intended the underlying agreement to be binding on them); *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 445-46 (3rd Cir. 2003) (court, not arbitrator, determined whether a party's performance demonstrated agreement to the underlying sales contract, where that party claimed that it never agreed to the contract and that there was no meeting of the minds on all contract provisions); *Boomer v. AT&T Corporation*, 309 F.3d 404, 414-17 (7th Cir. 2002) (court, not arbitrator, determined whether underlying agreement was based on valid offer, acceptance, and consideration); *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 28-31 (2nd Cir. 2002) (court, not arbitrator, addressed whether downloading of software provided adequate notice to show assent to agreement); *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 146-49 (2d Cir 2001) (court analyzed whether the parties reached a meeting of the minds to determine whether the underlying contract, and thus arbitration, was binding) (following *Interocean Shipping Co. v. Nat'l Shipping & Trading Co.*, 462 F.2d 673 (2nd Cir. 1972)); *PMC, Inc. v. Atomergic Chems. Corp.*, 844 F. Supp. 177 (S.D.N.Y. 1994) (holding that the court, and not arbitrator, should determine the threshold issue of whether the parties intended the underlying contracts, a signed purchase order and a confirmation of sale, to be legally binding by considering evidence such as the parties' behavior and subsequent negotiations), *aff'd without opinion*, 122 F.3d 1057 (2d Cir. 1995).

Respondents also try to re-characterize Glazer's claim as a garden variety *Prima Paint* fraudulent inducement

claim that the underlying contract is merely voidable, instead of his true claim that the contract never came into existence in the first place. Respondents are wrong, and their glaring failure to embrace the undisputed facts in Mr. Glazer's case is as shocking now as it was when the Sixth Circuit issued its first panel decision. There were numerous *separate* plaintiffs in the courts below whose cases were maintained separately but consolidated for procedural timing and briefing purposes only. The various plaintiffs' facts are highly distinct. For example, long before Gruttadauria was arrested, other plaintiffs entered into agreements with him wholly outside of Gruttadauria's criminal enterprise, only to be enmeshed in the crime later. Only Mr. Glazer, among all of the plaintiffs below, has the following undisputed facts that explain why no contract ever came into existence:

Frank Gruttadauria was a full-time criminal when he met Mr. Glazer. Gruttadauria, now in jail for his crimes, admitted that he was "desperate, both emotionally and financially . . . " and that he needed "new money" from Mr. Glazer to keep his criminal enterprise operating. Pet. App. at 87-88. Gruttadauria never intended, and did not have the capacity, for any binding meeting of the minds because the commission of a crime was taking place, not the formation of a contract. This crime has already been determined to be the direct result of astonishingly wilful violations of federal and state laws by SG Cowen and Lehman Brothers, who now want to benefit from their violations of the law. *See* SEC Administrative Orders, cited in Petition at 6, n. 3.

On these facts, a statute may not directly declare that the alleged agreement in this case is void *ab initio*. However, there can be no doubt that Gruttadauria's

undisputed criminal purpose toward Petitioner Glazer, while Gruttadauria also was the admitted agent of SG Cowen, and the brokerage firm's massive violations of law that allowed Gruttadauria's crimes to fester, utterly preclude the formation of a contract under the most fundamental laws of contract formation and equity in our justice system. *See* Petition at 16, n. 8. The few cases Respondents cite for their view that a contract existed do not have any facts remotely similar to the complete corruption in the present case. Glazer made these factual and legal arguments to the courts below, but the Sixth Circuit completely failed to address them due to its rote application of *Burden*. *Burden* is now called into question by *Buckeye Check Cashing*, currently pending before this Court. Petitioner therefore requests that his Petition on his first question presented be granted and decided in tandem with *Buckeye Check Cashing*.

II. Respondents Effectively Admit That The *Prima Paint* Fraudulent Inducement Defense Does Not Exist.

As expected, Respondents have not pointed to *any* reported or unreported court opinion in which a claim of fraudulent inducement of the arbitration provision was successful during the 38 years since *Prima Paint*. *Great Earth Cos., Inc. v. Simons*, 288 F.3d 878 (6th Cir. 2002), is the only one, and Respondents ignore *Great Earth* just like the Sixth Circuit panel did in the present case. Respondents' briefs are themselves effective admissions that this Court must breathe life into the *Prima Paint* fraudulent inducement defense, and it can start by granting the Petition on Glazer's second question presented. *Prima Paint* expressed a principle of federal substantive law, and

the Sixth Circuit must not be permitted to use state common law to negate the federal defense.

III. Respondents Failed To Reconcile The Inherent Conflict Between The Two Panel Decisions In The Current Case.

In its first panel decision, the Sixth Circuit invoked *Prima Paint* to hold that a court has no authority to address claims targeting the validity of the contract as a whole because the arbitration provision is separable. But then, in its second panel decision, the Sixth Circuit ignored *Prima Paint* and held that the court could use the whole contract as a defense in analyzing the validity of the arbitration provision. These holdings cannot be logically reconciled, and thus as expected, the Respondents have completely failed to do so. Respondents attempt to analogize court decisions like *Wilson Electrical Contractors, Inc. v. Minnotte Contracting Corp.*, 878 F.2d 167 (6th Cir. 1989), where the court referred to consideration recitals elsewhere in the broader contract in order to enforce an arbitration provision, but such cases are very different. Consideration is recited by the parties in order to bind them to *all* provisions of the contract, including arbitration. Thus, in a case like *Wilson Electrical*, referring to a consideration recital is nothing more than the court directly addressing the arbitration clause. In contrast, the second panel of the Sixth Circuit in this case was not merely referring to consideration, definitional provisions, or other provisions intended to apply to the entire contract, to determine the enforceability of arbitration. Instead, the second panel affirmatively used the broader contract, in direct contravention of the first panel's holding that the broader contract must not be considered by the

court under *Prima Paint* and *Burden*. This selective application of the Sixth Circuit's view of *Prima Paint*'s separability doctrine should not be permitted to stand.

CONCLUSION

For all of these reasons, and for the reasons stated in his Petition, Samuel Glazer respectfully requests that this Honorable Court grant his Petition, and that the merits of his case be decided in tandem with *Buckeye Check Cashing*.

Respectfully submitted,

KENNETH D. SCHWARTZ,
Counsel of Record
ROBERT P. DUVIN
EMILY C. FIFTAL
DUVIN, CAHN & HUTTON
Erieview Tower, 20th Floor
1301 East Ninth Street
Cleveland, Ohio 44114

Telephone: (216) 696-7600
Facsimile: (216) 696-2038
kschwartz@duvin.com
rduvin@duvin.com
efiftal@duvin.com

Counsel for Petitioner